

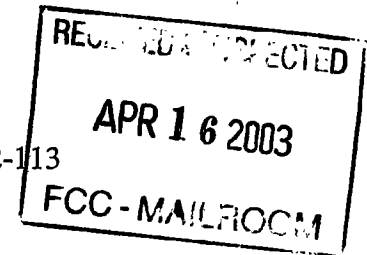
Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

Remedial Steps For Failure to Comply With
Digital Television Construction Schedule)

MM Docket No. 02-113



**REPORT AND ORDER
AND
MEMORANDUM OPINION AND ORDER ON RECONSIDERATION**

Adopted: April 4, 2003

Released: April 16, 2003

By the Commission:

I. INTRODUCTION

1. In this *Report and Order*, we establish remedial measures to be followed when requests to extend digital television (DTV) construction deadlines are denied. We adopt these procedures to further our continued commitment to the rapid build out of a nationwide system of DTV; to remind television licensees of the importance of their DTV construction efforts; and to prevent undue delay in the required build out of DTV facilities. The procedures we announce today will also provide guidance to stations seeking extensions of time and provide a unified and predictable set of procedures for treating stations that fail to meet their DTV construction deadline. We also deny the request to reconsider our decision in the *Order and Notice of Proposed Rulemaking*¹ restricting network-affiliated television stations in the top-thirty television markets from utilizing the minimum-facilities DTV STA policy.²

II. BACKGROUND

2. To further the rapid implementation of a nationwide system of DTV, we adopted in 1997 an aggressive DTV construction schedule.³ Affiliates of the top four networks in the top ten television markets were required to complete construction of their digital facilities by May 1, 1999; top four network affiliates in markets 11-30 by November 1, 1999; all remaining commercial television stations by May 1, 2002; and all noncommercial television stations by May 1, 2003.

¹ Remedial Steps For Failure to Comply With Digital Television Construction Schedule, 17 FCC Rcd 9962 (2002) (*Order and Notice of Proposed Rulemaking*).

² See para. 8, below.

³ See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 12 FCC Rcd 12809 (1997) (*Fifth Report and Order*).

3. As of March 12, 2003, a total of 1,578 television stations in all markets (representing approximately 93% of all stations) have been granted a DTV construction permit or license. There are a total of 894 stations now on the air broadcasting a digital signal, 397 with licensed facilities or program test authority and 497 operating pursuant to special temporary authority ("STA") or experimental DTV authority. Most Americans now have available to them an over-the-air signal from at least one digital television station, and many Americans have several DTV signals available to them.

4. In the top thirty television markets, 113 of the 119 network-affiliated television stations are on the air in digital, 107 with licensed DTV facilities or program test authority and 6 with STAs. In markets 1-10, of the 40 network affiliates due to be on the air by May 1, 1999, 38 are on the air with a digital signal. The remaining two were licensed and on the air prior to September 11, 2001, but are now off the air due to the attack on the World Trade Center. One top ten market network affiliate is operating pursuant to an STA and has been granted additional time to construct its DTV facilities. In markets 11-30, 70 of 79 network affiliate stations required to be on the air by November 1, 1999, have constructed their licensed DTV facilities. Seventy-five of these stations now are on the air. Seven stations have been granted additional time to complete construction of their digital facilities.

5. Approximately 1,196 commercial television stations were due to commence digital broadcasts by May 1, 2002. As of March 12, 2003, 679 of these stations are broadcasting a digital signal. In addition, 100 noncommercial educational television stations are voluntarily airing digital broadcasts ahead of schedule. The remaining 273 noncommercial educational television stations are scheduled to commence digital operations by May 1, 2003.

6. A total of 843 commercial television stations subject to the May 1, 2002, deadline requested an initial extension of time to complete construction. The Media Bureau granted 772 of these initial extension requests upon showings that the delay in completing construction was due to financial hardship or to circumstances that were either unforeseeable or beyond the permittee's control. The DTV construction permits for these stations were extended for a six-month period, until November 1, 2002. As of March 12, 2003, 602 of these stations have requested an additional extension of time to construct, and 457 of these requests have been granted. The remainder of these extension requests have either been dismissed or remain pending. A total of 31 stations have requested a third extension of time.

7. Seventy-one stations that requested an extension of the May 1, 2002 construction deadline were found not to have taken all reasonable steps to complete construction of their DTV facilities in an expeditious manner. Accordingly, the Media Bureau denied these extension applications by letter rulings and admonished each permittee for its failure to comply with its DTV construction obligations. Each permittee was given until December 1, 2002 to come into compliance with the DTV construction rule and was directed to submit, within 30 days, an initial report outlining the steps it intended to take to complete construction. These permittees also were required to file a subsequent progress report with the Commission.

8. In the *November DTV MO&O*,⁴ we established procedures for stations seeking an extension of May 1, 2002, and May 1, 2003, deadlines, and we set forth the standard by which we would review requests to extend those dates. We also stated that licensees with a May 1, 2002, or May 1, 2003, construction deadline would be deemed to have met their deadlines if they constructed, by those dates, DTV facilities that comply with the minimum initial build-out requirements. Such minimum facilities would be authorized by special temporary authorization (STA) and the underlying construction permit for full DTV facilities would be extended automatically until such time as the Commission determines otherwise (for example, by requiring that licensees either construct full replication or maximization facilities or relinquish interference protection).

9. In the *Notice of Proposed Rulemaking* in this proceeding, we sought comment on a series of steps to be taken when a station fails to meet its DTV construction deadline and fails to justify an extension. The proposed steps included a variety of sanctions and other measures designed to give stations the opportunity to cure their non-compliance with the DTV construction rule, while ensuring that stations complete their DTV construction in an expeditious manner. Under the third and final step in the process, we proposed rescinding the stations DTV authorization and we sought comment on whether a hearing was necessary under the Communications Act before imposing such a sanction. We also sought comment on whether to make the station's vacant DTV allotment available to other potential DTV broadcasters or to delete the allotment from the DTV Table. We tentatively concluded that a licensee whose DTV authorization is rescinded would not be permitted to convert to DTV on its analog allotment without being subject to competing applications.

III. DISCUSSION

A. Remedial Measures

10. In this *R&O*, we adopt procedures to apply when requests to extend are denied. Under our new procedures, when a television station fails to meet its DTV construction deadline and fails to adequately justify an extension of its DTV construction deadline, the following set of graduated sanctions will be imposed upon the station. First, we will deny the request for an unqualified extension and admonish the station for its failure to comply with its DTV construction obligation. The station must submit a report within thirty days outlining the steps it intends to take to complete construction and the approximate date that it expects to reach each of these construction milestones. Absent extraordinary and compelling circumstances, the construction completion date will be no later than six months from the date of admonishment. Sixty days after its initial report, the station must submit a report detailing its progress on meeting its proposed construction milestones and justifying any delays it has encountered. If at any time during this six-month period, the station fails to demonstrate that it is taking all reasonable steps to complete construction, or we otherwise find that the station has acted in bad

⁴ Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, 16 FCC Rcd 20524 (2001) (*November DTV MO&O*).

faith, we will consider the imposition of additional sanctions including proceeding immediately to other steps in our approach.

11. Under the second step in our approach, if the station has not come into compliance with the DTV construction rule within the six-month period, then, absent extraordinary and compelling circumstances, we will issue a Notice of Apparent Liability for forfeiture to the licensee and require that the station report every thirty days on its proposed construction milestones and its efforts to meet those milestones. Once again, failure to adequately demonstrate that the station was taking all reasonable steps towards construction or a finding that the station has acted in bad faith, will result in the imposition of additional sanctions.

12. Under the third and final step in our approach, if the station has continued to fail in its efforts to come into compliance with the DTV construction rule within the second six-month period of time (*i.e.*, one year from the date of the formal admonition), then, absent extraordinary and compelling circumstances, we will consider its construction permit for its DTV facilities to have expired and we will take whatever steps necessary to rescind the station's DTV authorization. The Media Bureau staff may grant relief from this graduated enforcement scheme or impose more severe steps more quickly should circumstances in a particular case warrant doing so.

13. The International Municipal Signal Association and the International Association of Fire Chief, Inc. (IMSA/IAFC) and Motorola, Inc. (Motorola) support this graduated approach.⁵ The High Definition Television Association of America (HDTVAA) agrees that, although good faith efforts to construct DTV facilities have been continuing, vigorous enforcement still is required.⁶ The National Association of Broadcasters and the Association of Maximum Service Television, Inc. (NAB/AMST) generally support the approach we have adopted and believe that the sanctions are aggressive enough to ensure that stations will move quickly toward meeting their DTV build-out obligations.⁷ Although the other commenters are divided on the appropriateness of various aspects of our remedial measures, none has proposed an alternative plan for the treatment of non-complying DTV stations that is as firm and flexible as the procedures described herein.

14. IMSA/IAFC suggest that we impose a forfeiture in the first step of the remedial process and that a second, more severe, forfeiture should be imposed in the second step.⁸ We find that it would be counterproductive to automatically issue a forfeiture in the first stage of our remedial measures. Although issuing a forfeiture in the first stage may be warranted in some egregious cases, we generally reserve that sanction for the second stage of the proceeding when

⁵ IMSA/IAFC Comments at 4; Motorola Reply Comments at 2.

⁶ HDTVAA Comments 2.

⁷ NAB/AMST Comments at 3.

⁸ IMSA/IAFC Comments at 3.

we are confronted with a station that, after an initial opportunity to cure its non-compliance, fails to do so.

15. Based upon the record in this proceeding, we believe that the graduated remedial measures adopted herein are an appropriate and sufficiently-flexible approach to ensure the continued successful build-out of DTV.⁹ The proposed set of sanctions to be imposed upon non-complying stations will give serious incentives for stations to take all possible steps to successfully complete DTV construction while providing non-complying stations the opportunity over time to come into compliance and complete their DTV construction. Although we find that overall DTV construction is continuing at an acceptable rate, we must be prepared to deal with those stations that do not meet their DTV construction obligation. The policy we adopted today will provide a fair and reasonable approach to ensuring that such stations complete their DTV construction in a timely fashion or face an increasingly severe series of sanctions.

16. We clarify that the sanctions we adopt today are meant to work in conjunction with our existing DTV extension rule and policies. Contrary to commenters such as Pollack/Beltz Communications Co., Inc., Brunson Communications, Inc., and Sunbelt Multimedia Co. (referred to herein as Joint Commenters), it is not our intention to supplant our current DTV extension rule or policies with the measures outlined in the *Notice of Proposed Rulemaking*.¹⁰ The Media Bureau will continue to evaluate extension requests consistent with the standard announced in the *Fifth Report and Order* and set forth in our extension rule.¹¹ The policy we adopt today shall be imposed only when a station files an extension request and that request is denied. For example, under the extension rule, a station may obtain an extension if it can demonstrate that construction was not completed due to "circumstances that are either unforeseeable or beyond the licensee's control" and the station took every reasonable step to prevent delay. However, once an extension request has been denied and the station begins to be examined under the procedures adopted in this proceeding, the station will be subject to a stricter standard and must show that its failure to meet the newly imposed construction completion deadline is due to 'extraordinary and compelling circumstances.' The Joint Commenters characterize this approach as "draconian."¹² They contend that a station that is denied a request for extension may subsequently experience a real delay, such as a local zoning problem that may not rise to the level of "extraordinary and compelling," but that should warrant an extension. We

⁹ New Life Evangelistic Center, Inc. (New Life) argues that the procedures are a violation of the First Amendment to the United States Constitution because they adversely impact church-run, noncommercial educational broadcast stations which New Life claims are finding it more difficult to complete their DTV construction. New Life Comments at 9. We disagree. The procedures we adopt today are content-neutral and apply to all stations, regardless of their format. They do not, therefore, violate the free speech provision of the First Amendment.

¹⁰ Joint Commenters at 2 (each of these parties filed identical comments).

¹¹ The DTV extension rule is contained in 47 C.F.R. § 73.624(d)(3). The standard for determining whether to grant an extension was first articulated in the *Fifth Report and Order*, 12 FCC Rcd at 12841, and was most recently supplemented in the *November DTV MO&O*.

¹² Joint Commenters at 5.

clarify that we will find that an "extraordinary and compelling circumstance" exists where the station demonstrates that construction was delayed by a new, unanticipated, intervening event. Stations should understand that, once their DTV extension request is denied, the burden to demonstrate that any of the remedial sanctions adopted herein should not be imposed will be greater than that which is required to show that an extension of the DTV construction deadline is warranted for stations that have not been found out of compliance. Stations seeking relief from these remedial procedures will be required to fully detail and document the delays they have experienced and must show that they took every reasonable step to prevent such delays. Again, only when a station is denied an extension will the new, stricter procedures we announce herein apply.

17. Sinclair Broadcast Group, Inc. (Sinclair) remarks that the Commission continues to "ignore the realities of DTV construction."¹³ Sinclair argues that the Commission is admonishing permittees for failure to comply with impossible deadlines. Sinclair points out the myriad of problems that stations face when attempting to construct a new broadcast facility. Paxson Communications Corporation (Paxson) is concerned that we will be imposing sanctions against stations without a thorough consideration of a permittee's extension request and the particular facts in each case.¹⁴ We previously recognized these challenges when we adopted our DTV extension rule and policies. Stations that have legitimate reasons for not being able to complete construction, and which properly set forth in detail those reasons in an extension request, may obtain an extension of their DTV deadline. Only those stations without legitimate reasons will be subject to the remedial measures proposed herein.

18. White Knight Holdings, Inc. (White Knight) opposed the procedures, arguing that they will harm smaller market licensees and encourage greater industry consolidation. Our rules have been mindful of the economic challenges faced by some small market stations. Small market stations have already been given additional flexibility in the construction of their DTV stations. First, stations in such markets were afforded more time to complete their facilities (with deadlines in May of 2002 and 2003) than their larger market counterparts who faced deadlines as early as May 1, 1999. Furthermore, smaller market stations may take advantage of our "minimum facilities" STA policy providing additional time for completion of their final licensed facilities. Smaller market stations may also seek an extension of their construction deadline under the procedures and policies adopted in the *November DTV MO&O*. The only smaller market stations affected by the procedures we adopt today will be those that have not completed construction and have failed to justify their delay.

19. Paxson suggest that allowing extensions of only six months is unreasonable and administratively wasteful.¹⁵ They suggest allowing for extensions that exceed six months, where appropriate. We find limiting DTV construction extensions to not more than six months properly

¹³ Sinclair Comments-at 3.

¹⁴ Paxson Comments at 2.

¹⁵ Sinclair Comments 2-3.

underscores the urgency of the deadline and encourages stations to continue to aggressively pursue completion of their DTV construction. Allowing only six-month extensions also provides us with the opportunity to more closely monitor the progress of station construction to ensure compliance. Therefore, we will not permit greater than six-month extensions for stations operating under our remedial program.

20. Sinclair also notes that the normal term for a broadcast construction permit granted by the Commission is three years. However, Sinclair and Paxson point to DTV stations that did not receive their construction permits until only a few months prior to the May 1, 2002 deadline.¹⁶ These stations have had only a few months to complete construction of their DTV facilities. Sinclair and Paxson argue that these stations should have more time to construct. The fact that some stations only had a few months to complete construction of their DTV facilities does not support a policy of allowing all stations to seek extensions greater than six months.¹⁷ We will consider the challenges faced by DTV permittees with shortened initial construction periods on a case by case basis in the context of extension requests.

B. Loss of DTV Authorization

21. We conclude that stations that ultimately fail to construct their DTV facilities shall have their DTV authorization rescinded pursuant to the terms of their construction permit and that a full evidentiary hearing is not required in those circumstances. Some commenters contend that a hearing is necessary because a DTV authorization is "the equivalent of a license, as it represents an eventual substitute for the NTSC channel currently licensed to the broadcaster" rather than an initial construction permit.¹⁸ In fact, each analog licensee received both a restated license, which authorized both existing analog and future DTV operations, and a construction permit to construct the actual DTV facilities. The construction permit had a set expiration date. Consistent with section 319(b) of the Communications Act, unbuilt construction permits that are not extended by the Commission expire without the requirement of an evidentiary hearing.¹⁹

¹⁶ Sinclair Comments at 7; Paxson Comments at 5.

¹⁷ Three parties raised issues concerning our underlying DTV construction deadline extension policy. Sinclair argues that we should allow lengthier extensions to facilitate the clearing of the Channel 52-59 and 60-69 television bands. Sinclair Comments at 8. NAB/AMST argue that satellite stations should be permitted additional time to complete construction of their DTV facilities. NAB/AMST Comments at 4. Nexstar Broadcasting Group, LLC (Nexstar) requests that the Commission consider the DTV build-out record of all stations in one common ownership group when it evaluates a group owner's requests for extension of time. Nexstar Reply Comments at 2. We decline to revise our underlying DTV construction deadline extension policy with respect to these matters and we will continue to examine extension requests on a case-by-case basis.

¹⁸ Joint Commenters at 8; see also Sinclair Comments at 7-9 (sections 312(c) and / or 316 require a hearing before rescinding DTV authorization or removing paired frequency from a license).

¹⁹ Section 319(b) of the Communications Act requires that a construction permit provide that "such permit for construction shall show specifically the earliest and latest dates between which the actual operation of the station is expected to begin, and shall provide that such permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee." The Commission effectuates this requirement by providing a grant date (continued....)

22. Because an active construction permit is required to construct DTV facilities, once the DTV construction permit expires, a licensee with a combined analog-digital license can no longer meet a condition precedent for the use of the DTV portion of the license. Restating the license to recognize this fact and eliminate DTV operating authority is a ministerial act, which does not require a hearing.

23. Moreover, there is another reason why individual evidentiary hearings would not be required here. Under the Supreme Court's decision in *United States v. Storer Broadcasting Co.*²⁰ and its progeny,²¹ an agency that promulgates a valid rule of general application may deny individual evidentiary hearings to those who facially violate the agency's rules. We believe the principle of these cases applies here given that our rules establish deadlines for the construction of DTV stations,²² and this order imposes uniform remedial measures to all stations holding DTV authorizations for a station's unjustified failure to satisfy its DTV construction requirements. In accord with *Storer* and other *Storer* doctrine cases, our newly adopted process further provides

(...continued from previous page)

and an expiration date on the face of the permit. Absent a waiver, a construction permit for a broadcast station does not extend beyond its expiration date. See, e.g., *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987) (affirming Commission's decision to terminate permit holder's right to construct and operate a new television station where after two extensions, permittee failed even to begin construction and failed to make a "specific and detailed showing" that failure to construct the station was due to causes beyond the permittee's control). It is the Commission's longstanding policy to grant an extension of the DTV construction deadline where a broadcaster is unable to complete construction due to circumstances that are either unforeseeable or beyond the licensee's control if the licensee has taken all reasonable steps to resolve the problem expeditiously. Fifth R&O at 12,841. The policy in section 319(b) also has a parallel in services where the Commission issues a license without a prior construction permit. In those services, failure to construct according to the terms of the license leads to cancellation of the license without the need for an evidentiary hearing. See *P&R Temmer v. FCC*, 743 F.2d 918, 927-928 (D.C. Cir. 1984) (termination of wireless license for failure to meet build out condition upon which license was conditioned did not require hearing because license did not confer unconditional right until condition was satisfied).

²⁰ *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (notwithstanding section 309's statutory hearing requirement, applications for licenses could be rejected without a hearing where applicant did not comply with the Commission's multiple ownership rule and failed to provide sufficient reasons for a waiver of the rule).

²¹ See, *WBEN, Inc. v. U.S.*, 396 F.2d 601 (2nd Cir. 1968) (upholding the Commission's change through rulemaking of pre-sunrise broadcasters' permissible operations even though the rule's effect was to modify license holders' operating powers without an individualized hearing as otherwise required under section 316 of the Communications Act), *cert. denied*, 393 U.S. 914 (1968); *California Citizens Band Assn. v. U.S.*, 375 F.2d 43 (9th Cir. 1967) (applying the *Storer* doctrine allowing rulemaking to modify the powers of citizens radio service licensees without individualized hearings as otherwise required under section 316 of the Communications Act), *cert. denied*, 389 U.S. 844 (1967). See also, *Air North America v. Dep't of Transportation*, 937 F.2d 1427 (9th Cir. 1991) (upholding agency's decision to revoke, without a hearing, airline's certificate of authority to provide air transportation for violating agency's dormancy rule, notwithstanding statutory requirement for notice and a hearing before revocation); *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (D.C. Cir. 1966) (although statute required an adjudicatory hearing before an aviation certificate could be modified, agency's regulation modifying certificate without a hearing upheld since regulation was general in nature; court rejected the contention that the *Storer* doctrine is inapplicable to rulemaking proceedings in which outstanding licenses are affected), *cert. denied*, 385 U.S. 843 (1966).

²² 47 CFR § 73.624(d).

affected persons the opportunity to demonstrate any special reasons that our rules should not be applied to their individual case.²³

24. Once a station's DTV authorization is rescinded, the station will find itself with an authorization that allows only NTSC operation. In that case, as directed by Congress, the station will be required to surrender its NTSC authorization at the end of the DTV transition.²⁴ In addition, a station that loses its DTV authorization will not be permitted to convert to digital on its analog allotment without being subject to competing applications.²⁵ The Joint Commenters and Sinclair disagree with this approach. The Joint Commenters contend that at no time should licensees be subject to competing applications for their original NTSC channels when the time comes for conversion of NTSC operation to DTV mode.²⁶ They draw an analogy to Congress' elimination of the Commission's policy under which television licensees were subjected to competing applications at renewal time. The Joint Commenters contend that the procedures set forth in the *Notice of Proposed Rulemaking* propose a new version of a "tried but untrue comparative renewal procedure by suggesting that a broadcaster who could not convert to digital on a desired schedule would, in effect, face confiscation of his or her entire investment in the existing NTSC channel."²⁷ Sinclair argues that we have previously deemed DTV applications to be minor modification applications and that we have not permitted competing applications to be filed against them.

²³ See, *Storer, supra*, 351 U.S. at 205 (provision of Communications Act requiring full hearing is satisfied by permitting applicant in violation of the rule to present application setting out adequate reasons why rule should be waived or amended); *WBEN, supra*, 396 F.2d at 618 (modification of all existing licenses through rulemaking upheld, notwithstanding adjudicatory hearing requirement under the statute, where licensee was provided opportunity to seek waiver of, or exception to, the rules). It is the Commission's policy to grant an extension of the applicable construction deadline where a broadcaster is unable to complete construction due to circumstances that are either unforeseeable or beyond the licensee's control if the licensee has taken all reasonable steps to resolve the problem expeditiously. *Fifth Report and Order*, 12 FCC Red at 12841. Remedial action does not begin unless a broadcaster fails to meet that standard, and, even when the remedial measures are applied, a station will be permitted additional time to complete construction where it demonstrates extraordinary and compelling circumstances.

²⁴ See 47 U.S.C. §§ 309(j)(14) and 336(c).

²⁵ We note that there are "single channel" television stations that do not have a paired DTV channel. At the time the DTV Table of Allotments was designed, there were pending applications for certain new analog stations. Rather than allot a paired DTV channel for those proposed facilities, the Commission decided to permit those stations to operate as either an analog or DTV station on their single channel. These stations have the choice to either build and operate as analog and then convert to DTV or simply begin operating as a DTV station. If they elect to operate as analog first, then they must build an analog station by their analog construction deadline or risk losing their authorization. Similarly, if they choose to build a DTV station they must build it by the deadline or lose their authorization. If they build an analog station, they do not have to convert to DTV until the end of the DTV transition. Unlike stations that have had their DTV CP expire without constructing, these analog only stations would be eligible to receive a DTV CP to convert from analog to digital operations.

²⁶ Joint Commenters at 9.

²⁷ *Id.*

25. Requiring a station that has lost its DTV authorization for failure to timely construct to turn in its NTSC authorization in such circumstances is both good public policy and mandated by Congress. We read Sections 309(j)(14) and 336(c) of the Communications Act to mandate that the NTSC authorization be returned to the Commission in such cases. The language of those sections makes it clear that Congress intended that stations not be able to retain their rights to operate an NTSC station following the completion of the DTV transition. The former holder of an NTSC authorization does not stand in the stead of a renewal applicant or a licensee seeking a modification to join a paired DTV channel to its station's license authorization, as suggested by the Joint Commenters and Sinclair. Rather, it is an applicant seeking a permit to construct a new digital-only television broadcast station and, as such, is subject to competing applications and our competitive bidding procedures. In addition, we must have an ultimate sanction to impose on those stations that either refuse to construct a DTV facility or abuse our DTV construction schedule. We intend this sanction to be utilized only as a final measure and trust that it will be employed in only the most egregious circumstances. Stations that genuinely desire to complete construction of the DTV facilities will be given every opportunity to do so. Those who nonetheless refuse to complete the transition to a digital television service will not be permitted to continue broadcasting in a mode that does not make the most efficient and effective use of the spectrum to provide service to the public and is contrary to Congressional mandate to terminate analog broadcasting at the end of the transition.

C. Vacant DTV Allotments

26. In the event that a DTV allotment is made vacant as a result of these procedures, we must determine whether to make that vacant DTV allotment available to other potential DTV broadcasters, or delete the allotment from the DTV Table altogether. The commenters were split on this issue. The HDTVAA supports making such allotments available to other interested broadcasters and, only in extraordinary circumstances, such as the likelihood of severe interference, should vacant DTV allotments be retired.²⁸ The Association of Public Television Stations (APTS) objects to the deletion of any reserved DTV channels as inconsistent with the Commission's policy of giving noncommercial educational entities greater opportunities to reserve spectrum.²⁹ The Joint Commenters argue that we should consider each case under Section 307(b) of the Communications Act, taking into account the special circumstances of each case.³⁰ We conclude that the best approach would be to delete from the DTV Table those allotments made vacant as a result of the procedures we adopt herein. Deletion of these DTV allotments may help to eliminate possible interference problems that would allow other stations to provide DTV service.³¹ This would constitute a better use of DTV spectrum. Deletion would be without prejudice and those parties interested in having the channel reallocated could file a

²⁸ HDTVAA Comments at 2.

²⁹ APTS Comments at 5.

³⁰ Joint Commenters at 8.

³¹ Problems with DTV to DTV and DTV to NTSC interference has been one of the greatest challenges we have faced during the transition to DTV.

petition for rulemaking proposing a new DTV channel that would be examined under our technical rules for new DTV allotments. Therefore, where there is a need for and interest in a new DTV channel, a procedure would remain for ensuring that such a need is met.

D. Authority Delegated to Media Bureau to Deny Extension Requests

27. We reiterate that we have delegated authority to the Media Bureau to consider all DTV extension requests and to impose these sanctions. The Joint Commenters are opposed to this approach.³² They contend that, once the Media Bureau has denied a DTV extension, a presumption against grant will already be in place when the matter reaches the Commission on appeal. The Joint Commenters maintain that stations denied DTV extensions will undoubtedly seek reconsideration or file an application for review with the Commission. They contend that there will be delay in processing while the Bureau is imposing the sanctions announced herein and the Commission is reviewing an appeal of the Bureau's denial. It would be better for both matters to be before the Commission, the Joint Commenters argue. We do not agree that a delay in processing of reconsideration of denials of extensions will occur as a result of our policy to allow the Media Bureau to make such decisions. We delegated authority to the Media Bureau to deny DTV extensions in an effort to reduce the amount of time for the review and processing of extension requests and for administrative efficiency. We continue to believe that the delegation of authority to the Media Bureau is more conducive to the proper dispatch of the Commission's processes.

28. Sinclair and White Knight contend that the Media Bureau impermissibly began utilizing the procedures set forth in the *Order and Notice of Proposed Rulemaking* before completion of this proceeding.³³ They claim that the Media Bureau was predisposed to use the procedures we proposed in the *Order and Notice of Proposed Rulemaking* and that such action violated due process. In the *Order and Notice of Proposed Rulemaking*, we directed the Media Bureau to continue processing pending DTV extension requests on a case-by-case basis during the pendency of this proceeding. The Media Bureau was free to utilize a full range of sanctions, including the types of sanctions proposed in the *Order and Notice of Proposed Rulemaking*. Therefore, the Media Bureau was not prematurely applying the proposed procedures, but rather utilizing sanctions that it already had at its disposal. The purpose of this proceeding was to standardize the approach to be used when stations fail to meet their DTV construction obligations. Therefore, there was nothing impermissible in the Media Bureau beginning the process of reviewing DTV extension requests and, where appropriate, denying requests and imposing whatever sanction it deemed appropriate.

E. Reconsideration of Minimum-Facilities STA Policy

29. In the *Order and Notice of Proposed Rulemaking*, we declined to permit network affiliated stations in the top-thirty television markets to take advantage of the "minimum facilities"

³² *Id.* at 7.

³³ Sinclair Comments at 6-7; White Knight Comments at 4-7.

STA policy. Sinclair asked that we reconsider this decision and permit its station KDNL-DT, St. Louis, Missouri, to operate a temporary reduced power facility. Sinclair argues that KDNL-DT should not have been deemed a network-affiliated top-thirty market station because, while the station is an ABC affiliate in a top-thirty market, it is actually the *fifth-ranked station in the market*. Sinclair correctly notes that stations in the top-thirty television markets not affiliated with one of the four major television networks (ABC, CBS, NBC and Fox) may operate under the minimum-facilities STA policy. It is only those stations affiliated with the top four networks that are prohibited from utilizing the minimum-facilities STA policy. Sinclair argues that one of the non-network-affiliated stations in St. Louis actually has higher ratings than KDNL-DT. It would be unfair, Sinclair suggests, to allow this station to operate a minimum DTV facility and not KDNL-DT. Sinclair's argument goes back to the original decision by the Commission to subject stations in the top-thirty television markets to early construction deadlines based upon the fact that they were affiliated with one of the top four networks. Sinclair's request that we base the decision not on whether a station is affiliated with a certain television network but instead on the station's ranking in the market constitutes an impermissibly late request to reconsider a policy long since in place. Accordingly, we deny that request.

F. Additional Information

30. For additional information, contact Shaun A. Maher, Media Bureau, Office of Broadcast License Policy, Video Division, (202) 418-2324 or smaher@fcc.gov.

IV. ORDERING CLAUSES

31. ACCORDINGLY, IT IS ORDERED, That, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, 319 and 336 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 319 and 336, this *Report and Order and Memorandum Opinion and Order on Reconsideration* is ADOPTED.

32. IT IS FURTHER ORDERED, That the Request for Reconsideration filed by Sinclair Broadcast Group, Inc., IS DENIED.

33. IT IS FURTHER ORDERED, That the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Report and Order and Memorandum Opinion and Order on Reconsideration*, including the Final Regulatory Flexibility Act Analysis, to the Chief Counsel for the Small Business Administration.

34. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A***Parties Filing Comments and Reply Comments*****Comments**

Brunson Communications, Inc.
Mr. James Varney
Paxson Communications Corporation
Pollack/Beltz Communications Co., Inc.
New Life Evangelistic Center, Inc.
Sinclair Broadcast Group, Inc.
Sunbelt Multimedia Co.
The Association of Public Television Stations
The High Definition Television Association of America
The International Municipal Signal Association
The National Association of Broadcasters and the Association of Maximum Service Television, Inc.
White Knight Holdings, Inc.

Reply Comments

Motorola, Inc.
Nexstar Broadcasting Group, LLC

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),³⁴ and Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Order and Notice of Proposed Rulemaking*.³⁵ The Commission sought written public comment on the proposals in the *Order and Notice of Proposed Rulemaking* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³⁶

A. Need for, and Objectives of, the Proposed Rules

2. The Commission adopts these remedial measures to prevent undue delay in the required build out of DTV facilities.

B. Summary of Significant Issues Raised By Public Comments in Response to the IRFA

3. New Life Evangelistic Center, Inc (NLEC) filed comments on the IRFA. NLEC complains that television stations will have to spend millions of dollars to comply with the DTV construction requirement. However, that matter was previously considered in the DTV rulemaking proceeding wherein the Commission adopted the DTV construction requirement and timetable. In the instant proceeding, the Commission only considered what steps to take when a station fails to meet its construction requirement. Therefore, NLEC's comments were not on point.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.³⁷ The RFA defines the term "small entity" as having the same meaning as "small business," "small organization," and "small governmental jurisdiction."³⁸ In addition, the term "small business"

³⁴ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

³⁵ Remedial Steps For Failure to Comply With Digital Television Construction Schedule, 17 FCC Rcd 9962 (2002) (*Order and Notice of Proposed Rulemaking*).

³⁶ See 5 U.S.C. § 604.

³⁷ 5 U.S.C. § 603(b)(3).

³⁸ *Id.* § 601(6).

has the same meaning as the term "small business concern" under the Small Business Act.³⁹ A "small business" concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁴⁰

5. The proposals in the *R&O* will affect only full-power television broadcasters. As of September 30, 2001, the Commission had licensed a total of 1,686 full-power television stations.⁴¹ SBA defines television broadcasting establishments that have \$12 million or less in annual receipts as a small business.⁴² According to Census Bureau data for 1997, there were 906 firms in this category, total, that operated for the entire year.⁴³ Of this total, 728 firms had annual receipts of under \$10 million, and an additional 71 had receipts of \$10 million to \$24,999,999. Thus, under this size standard, the majority of the firms are considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

6. The *Report and Order and Memorandum Opinion and Order on Reconsideration* contains a new reporting requirement. Stations that fail to construct their DTV stations by the requisite deadline and fail to justify an extension of their DTV construction permit will fall into the remedial measures set forth in the document. Among the remedial measures, is the requirement that the station submit periodic reports detailing their efforts to comply with the extended DTV construction deadline. The reports will be filed in letter form with the Secretary's office.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

7. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation,

³⁹ *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 32). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

⁴⁰ *Id.* § 632.

⁴¹ News Release, "Broadcast Station Totals as of September 30, 2001" (released October 30, 2001).

⁴² NAICS Code 513120.

⁴³ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size," Table 4, NAICS code 513120 (issued Oct. 2000).

or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁴⁴

8. The *R&O* contains remedial steps for failure of broadcast stations to comply with the DTV construction schedule. These steps are applied only after a station has failed to demonstrate this it qualifies for an extension of its schedule. The Commission's rules and policies already contain flexible measures for allowing stations in smaller markets to seek an extension of their DTV construction deadline. Those measures remain unchanged by the *R&O*.

9. One of the sanctions that may be used is the issuance of a notice of apparent liability for forfeiture to stations that do not comply with their DTV construction obligation. We already take small entity status, including potential inability to pay, into account when assessing the need for, and amount of, monetary forfeitures.⁴⁵

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

10. None.

G. Report to Congress

11. The Commission will send a copy of the *Report and Order and Memorandum Opinion and Order on Reconsideration*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁴⁶ In addition, the Commission will send a copy of the *Report and Order and Memorandum Opinion and Order on Reconsideration* including this FRFA to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order and Memorandum Opinion and Order on Reconsideration* and FRFA (or summaries thereof) will also be published in the Federal Register.⁴⁷

⁴⁴ 5 U.S.C. § 603(c).

⁴⁵ See, e.g., In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to incorporate the Forfeiture Guidelines, CI Docket No. 95-6, *Report and Order*, 12 FCC Rcd 17087, 17109 (1997).

⁴⁶ See 5 U.S.C. § 801(a)(1)(A).

⁴⁷ See 5 U.S.C. § 604(b).